

1986

Fisher v. Trapp : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSHUA FISHER, by and through
his general guardian,
CARLA FISHER,

Appellant,

vs.

WARREN TRAPP,

Respondent.

PETITION FOR REHEARING

Case No. 860359-CA

Category No. 14(b)

PETITION FOR REHEARING

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POINT ONE

REHEARING IS NECESSARY BECAUSE
THE COURT'S DECISION IS CONTRARY
TO UTAH SUPREME COURT DECISIONS

A. The Trial Court and the Court of Appeals are Bound by
Decisions of the Utah Supreme Court

Both the trial court and the court of appeals are bound by prior decisions of the Utah Supreme Court. The fact that this Court is uncomfortable with such a decision does not give it the discretion to evade the effect of

the higher court's decision. See e.g., Van Tassell v. Shaffer, 64 Ut.Adv.Rpt. 73 (Sept. 1, 1987), where the Court of Appeals deferred to a rule on "tolling" which it clearly found wanting. Accord, State v. Gore, 681 P.2d 227 (Wash. 1984).

B. The Utah Supreme Court has Clearly Held that Evidence of Flight is Admissible

The court of appeals' opinion states that Trapp's flight had "little, if any, relevance" (p. 5). However, the Utah Supreme Court has flatly declared: "We have previously ruled that evidence of flight is probative." State v. Franklin, 735 P.2d 34, 39 (Utah 1987). State v. Bales, 675 P.2d 573 (Utah 1983), likewise affirmed "the admissibility of evidence of flight. . ." Bales merely dealt with the kind of instruction which should accompany admissions.

The "overwhelming" prejudice from admission of flight, as claimed in this Court's opinion is not mentioned by either case. Indeed, there appears to be a de facto rule that evidence of flight is always admitted in criminal cases. A survey of criminal cases nationwide since 1981 shows over 200 cases where flight was admitted. Not one was reversed for unfair prejudice to the defendant. (See West

Digest Criminal Law, Key No. 351(3).) Indeed, trial courts in criminal cases have abused their discretion in excluding flight. U.S. v. Martinez, 681 F.2d 1248 (10th Cir. 1982) (abuse to exclude under Rule 403).

Furthermore, this Court will undoubtedly continue to affirm criminal convictions based in part on evidence of flight. The rule in Franklin and Bales admitting flight evidence is the law in Utah.

C. State v. Franklin Applies in Civil Cases

This court's opinion relegates Franklin and its progenitors to a footnote, and distinguishes them because they arose "in the criminal context" (p. 3). This reasoning fundamentally misunderstands the scope of the rules of evidence and precedents interpreting them. Utah Rule of Evidence, 101, states "These rules govern proceedings in the courts of this state. . ." No exception is made for criminal cases.

The Advisory Committee note indicates that the Rules of Evidence are "applicable in all instances in court's of the State." Furthermore, former Rule 2 of the Utah Rules of Evidence expressly applied the rules of

evidence to both criminal and civil cases. There is no authority, and no reason, for the view that evidence which is admissible in criminal cases is inadmissible in civil cases.

Precedents interpreting the Rules of Evidence are applicable in both criminal and/or civil cases. Otherwise, two separate bodies of case law would develop out of identical rules.

This court's opinion goes on to assert that flight evidence is "circumspectly" admitted. Presumably, this means admitted with an appropriate cautionary instruction.¹ Fisher has no particular quarrel with the need for an appropriate instruction. Thus, the only consistent rule would be that evidence of flight should be "circumspectly" admitted in civil cases also, with an appropriate cautionary instruction.

D. Criminal Negligence Cases Always Admit Evidence of Flight

The claimed distinction between admission of flight evidence in "a civil action for negligence" and "in

¹"Circumspectly" may be intended to mean "seldom." This would probably come as a complete surprise to criminal defense lawyers in Utah.

the criminal context" completely collapses in those cases where negligence and criminal conduct overlap. Criminal negligence cases involving driving an automobile uniformly admit evidence of post-accident flight.

In State v. Pierce, 647 P.2d 847 (Mont. 1982), a hit-and-run drunk driver was convicted of aggravated assault and criminal negligence. The Montana Supreme Court stated "Flight by the defendant may be considered by the jury as a circumstance tending to prove consciousness of guilt." Id. at 851. Admissibility of flight was upheld even though the defendant admitted causing the accident and even though there were ample witnesses.

Evidence of post-accident flight was also admitted in the following cases: Clay v. State, 128 A.2d 634 (Md. 1957)(prosecution for manslaughter based on gross negligence; defendant admitted he caused the accident); State v. Humbolt, 562 P.2d 123 (Kan. App. 1977)(involuntary manslaughter conviction; admissible to show "consciousness of guilt"); People v. Allen, 14 N.E.2d 397 (Ill. 1938)(manslaughter based on willful and wanton negligence; defendant admitted to accident); State v. Achter, 445 S.W.2d 318 (Mo. 1969)(evidence of post-accident flight considered

on issue of culpable negligence). Presumably, the same dangers in admitting flight evidence exist in these criminal cases as in civil cases.

POINT TWO

REHEARING IS APPROPRIATE BECAUSE THE COURT HAS CREATED AN ARBITRARY AND UNFAIR RULE

This Court's opinion would allow evidence of flight if Trapp were being prosecuted for drunk driving, but not when his innocent victim sues him. This rule is doubly unfair--unfair to criminals doing time on the basis of "overwhelmingly" prejudicial evidence of flight, and unfair to their victims who cannot recover from them.

The reality is that the same facts that support criminal liability also gives rise to civil liability. Why should balancing under Rule 403 of the same facts result in admission in the criminal case, but not in the civil case?

This Court found prejudice in the danger that the jury will not believe other reasons the defendant has for fleeing (p. 5). This same danger exists in every criminal case (including Franklin and Bales). Why is the danger that the jury will discount the defendant's explanation so

compelling in a civil case, yet not compelling in a criminal case? The rule laid down in this Court's opinion is arbitrary and unfair. Rehearing should be granted.

DATED this 21 day of January, 1988.

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By
Robert D.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing PETITION FOR REHEARING (Fisher v. Trapp) was mailed, U.S. Mail, postage prepaid, this 21 day of January, 1988, to the following:

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A handwritten signature, appearing to be 'R. E. G.', is written over a horizontal line.